

*These notes refer to the Criminal Defence Service Act 2006 (c.9)
which received Royal Assent on 30th March 2006*

CRIMINAL DEFENCE SERVICE ACT 2006

EXPLANATORY NOTES

INTRODUCTION

1. These explanatory notes relate to the Criminal Defence Service Act which received Royal Assent on 30th March 2006. They have been prepared by the Department for Constitutional Affairs in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. These notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require an explanation or comment, none is given.

TERRITORIAL EXTENT

3. The Act's provisions extend to England and Wales.

TERRITORIAL APPLICATION: WALES

4. The Act has no effect on the National Assembly for Wales, and no other particular effect on Wales.

SUMMARY

5. This Act changes the arrangements for the grant of public funding for representation in criminal proceedings in England and Wales.
6. It provides for the power to grant rights to representation to be conferred on the Legal Services Commission (LSC) instead of the court. It introduces a test of financial eligibility for the grant of such funding and, in cases where eligibility exists, contributions based on means.

BACKGROUND

7. The creation of the Criminal Defence Service (CDS) was part of the Government's fundamental reform of the legal aid system, as set out in the Access to Justice Act 1999, which received Royal Assent in July 1999.
8. The purpose of the CDS is to ensure access for individuals involved in criminal investigations or criminal proceedings to such advice, assistance and representation as the interests of justice require.
9. The CDS was implemented and managed by the LSC which was also created by the Access to Justice Act 1999. The General Criminal Contract is the framework within which the CDS operates under the management of the LSC. Solicitors are required to work within quality assured contracts to perform CDS functions.
10. The LSC is responsible for funding legal representation under the Criminal Defence Service. However, under the existing structure, it is the courts – and not the LSC or the Department for Constitutional Affairs (DCA) – which are responsible for granting the right to have funding.
11. The Act enables the Lord Chancellor to confer power to grant rights to have funding on the LSC instead of the court.

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12. The old criminal legal aid scheme established by the Legal Aid Act 1988 and abolished by the Access to Justice Act 1999 provided for means testing in deciding whether a person was eligible for representation, and, if so, in deciding whether the represented person should be required to make a contribution to the cost of representation. The Access to Justice Act 1999 did not include provisions parallel to these, other than the powers in section 17 for courts other than magistrates' courts to order a defendant to pay a contribution to defence costs.

THE ACT

13. Section 1 deals with the grant of rights to representation, and enables regulations to be made to provide the LSC with the powers to grant and withdraw rights to representation.
14. Section 2 provides for the rights to representation to be granted only where an individual satisfies financial eligibility criteria.
15. Section 3 deals with the making of contribution orders where the financial eligibility criteria are satisfied.
16. Section 4 makes consequential amendments to other legislation.

COMMENTARY ON SECTIONS

Section 1: Grant of rights of representation

17. Section 1 amends Schedule 3 to, and section 25 of, the Access to Justice Act 1999. That Schedule makes provision as to which bodies grant rights to representation, and the criteria on which such rights are granted.
18. *Subsection (2)* qualifies the general provision, in paragraph 2(1) of Schedule 3, conferring power on courts to grant rights to representation, with reference to new sub-paragraph (1A).
19. *Subsection (3)* inserts new sub-paragraph (1A) into paragraph 2 of Schedule 3. This provides that courts shall not be able to exercise the power where the LSC has the power to grant a right to representation, unless regulations provide otherwise, or in any other circumstances that may be prescribed.
20. *Subsection (5)* inserts new sub-paragraph (5A) into paragraph 2 of Schedule 3, which provides that courts do not have the power to withdraw the right to representation where the LSC has that same power. *Subsection (4)* makes the necessary consequential amendment to paragraph 2(5) of Schedule 3.
21. *Subsection (6)* inserts new paragraph 2A into Schedule 3. This provides that regulations may provide for the LSC to grant the right to representation in criminal proceedings, other than those prescribed under section 12(2)(g) of the 1999 Act (in relation to which the LSC already grant rights to representation) and similarly that the LSC will also have the power to withdraw any right to representation where it has already been granted. This new paragraph allows for regulations to make any consequential amendments or repeal any enactment that the Lord Chancellor considers appropriate.
22. *Subsection (7)* substitutes paragraph 3(2) and (3) of Schedule 3 (which relates to the grant of rights by the LSC) with new paragraph 3A so that the form of the grant may be prescribed in regulations. Paragraph 3A also provides that the regulations may include any transitional provisions that the Lord Chancellor considers appropriate.
23. *Subsection (8)* provides that regulations under paragraph 2A will be subject to the affirmative resolution procedure.

Section 2: Rights to representation: financial eligibility

24. Section 2 amends Schedule 3 to the 1999 Act to provide for financial eligibility.
25. *Subsection (2)* inserts paragraph 3B which provides that power to grant a right to representation can only be exercised where an individual's financial resources are such that the body considering the application is satisfied that he is eligible. This paragraph also provides that there is an obligation to withdraw the right where an individual's financial resources are not such that he is eligible to be granted a right to representation or that the individual failed to provide information about his resources.
26. Paragraph 3B also provides that regulations may allow exceptions to the provisions outlined in paragraph 24.
27. There are ancillary powers to include in regulations a requirement for individuals to provide information to support the application, and provision for the notification and review of decisions. There is power to prescribe the circumstances when the body reviewing a decision in relation to financial eligibility may refer a question to the High Court. There is also power to make transitional provision.
28. *Subsections (3) and (4)* make consequential amendments to paragraph 5 of Schedule 3.
29. *Subsection (5)* provides that the first regulations under paragraph 3B will be subject to the affirmative resolution procedure.
30. *Subsection (6)* adds a definition of "relevant authority" to section 26 of the 1999 Act.

Section 3: Rights to representation: Contribution orders

31. Section 3 provides for contribution orders to be made against an individual who has been granted public funding.
32. *Subsection (2)* qualifies the general prohibition in section 17(1) of the 1999 Act on requirements to contribute to the cost of representation, but also provides an exception to the existing power in section 17(2) for a court (other than a magistrates' court) to order a contribution to defence costs, in so far as a contribution order is made under the provisions introduced by this Act.
33. *Subsection (3)* inserts new section 17A into the 1999 Act. This provides for regulations to provide for a prescribed body to order the individual to pay the full costs of representation or a contribution towards them. Regulations may also deal with the type of information that should be provided, how the costs of representation will be determined, how the contribution orders should be paid, interest on payments made after the time when representation is provided or on any outstanding contributions, how an outstanding debt may be recovered – including the power to withdraw representation, the variation or revocation of contribution orders and appeals against the making of a contribution order. Regulations must make provision for the repayment of any overpayment from a contribution order; they must further ensure that no defendant is subject to both a contribution order and Recovery of Defence Costs Order where the total value of both exceeds the total costs of his defence. Regulations may also allow for pilot schemes for contribution orders to be set up in prescribed areas and for a specified period.
34. *Subsection (4)* provides that the first regulations under new section 17A will be subject to the affirmative resolution procedure.

Section 4: Consequential Amendments

35. Section 4 makes consequential amendments to other legislation which are necessitated by the Act. *Subsection (1)* amends the Attachment of Earnings Act 1971 so as to enable a magistrates' court to make an attachment of earnings order to secure the payment of any sum required to be paid under regulations made under the new section 17A(1) in the 1999 Act which is inserted by the Act. A

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similar power already exists in relation to sums required to be paid under orders under section 17(2) of the 1999 Act.

36. *Subsection (3)* amends provisions in the Children and Young Persons Act 1969 and the Powers of Criminal Courts (Sentencing) Act 2000 which are listed in *subsection (2)*, as a result of the re-introduction of means testing. These provisions restrict courts' powers to deal with a person who is unrepresented. Before the Access to Justice Act 1999 those four provisions, which pre-dated that Act, provided that the courts' powers were limited in respect of an unrepresented person, except where he had refused or failed to apply for legal aid, having had an opportunity to do so, or if legal aid had been refused because his financial resources made him ineligible. The second exception was removed by the 1999 Act. With the re-introduction of means testing the exception is now being restored to the pre-1999 Act provisions and added to the one post-1999 Act provision. An exception is also made where the right to representation is withdrawn because the person's financial resources make him ineligible.

COMMENCEMENT

37. The substantive provisions of the Act will come into force on a day or days appointed by the Lord Chancellor.
38. A bill for this Act was first introduced in the House of Commons on 15 December 2004, but it did not make any progress during the Parliamentary session 2004-05. It was re-introduced in the House of Lords in the session 2005-06.

HANSARD REFERENCES

The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament.

Stage	Date	Hansard Reference
HOUSE OF LORDS		
Introduction	23 May 2005	Vol. 672 Col 6
Second Reading	13 June 2005	Vol. 672 Cols. 1073-1089
Committee	28 June 2005	Vol. 673 Cols. GC1-GC22
Report	17 Oct 2005	Vol. 674 Cols 581-598
Third Reading	24 Oct 2005	Vol. 674 Col. 1026
HOUSE OF COMMONS		
Introduction	24 Oct 2005	Vol. 438
Second Reading	13 Dec 2005	Vol. 440 Cols 1238-1273
Committee	10 Jan 2006	Standing Committee A
Report and Third Reading	26 Jan 2006	Vol. 441 Col. 1549-1590

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HOUSE OF LORDS		
Lords Consideration of Commons Amendments	13 Mar 2006	Vol. 679 Col. 984-986
ROYAL ASSENT	30 March 2006	House of Lords Hansard Vol 680 Col 861 House of Commons Hansard Vol 444 Col 1061

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